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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

Crim. No. 05-30067-AA
OPINION AND ORDER

vs.

RODERICK ALYN PRESCOTT,

Defendant.

Karin Immergut
United States Attorney
District of Oregon
Jay Nanavati
Timothy Stockwell
United States Department of Justice
Tax Division
Criminal Enforcement Section
Western Region
601 D Street NW, Room 7904
Washington, DC 20004
Attorneys for United States of America

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Attorney for defendant

AIKEN, Judge:

Defendant filed a renewed motion to strike surplusage from the indictment. On April 2, 2008, this court denied as moot defendant's initial motion to strike surplusage. On June 11, 2008, the court held oral argument on defendant's renewed motion. Defendant's renewed motion is denied with leave to renew.

STANDARDS

"The purpose of a motion to strike [surplusage] under Fed. R. Crim. P. 7(d) is to protect a defendant against 'prejudicial or inflammatory allegations that are neither relevant nor material to the charges.'" United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988) (quoting United States v. Ramirez, 710 F.2d 535, 544-45 (9th Cir. 1983)). The district court has discretion in ruling on a motion to strike surplusage. Terrigno, 838 F.2d at 373.

DISCUSSION

The defendant moves to dismiss Paragraphs 3, 4, and 5 from Count 6 of the indictment as surplusage. The surplus paragraphs read as follows:

3. Through "educational seminars" conducted by NTS, Fritts and Prescott promoted and sold complex abusive trust packages to clients in, among other places, the Northern District of California.
4. At these seminars, clients were encouraged to purchase trust packages from NTS and instructed to create their own multi-tiered, complex web of trusts designed to receive their income and hold title to their assets and pay expenses,

while purporting to exempt their income and assets from taxation.

5. On May 1, 1995, Fritts and Prescott created Fountainhead Global Trust("FGT"), through which they actively promoted to, and managed offshore investments for, clients who had SUPERSEDING INDICTMENT purchased trust packages from NTS. Though FGT promised clients large returns on their offshore investments, FGT operated as a typical "Ponzi" scheme whereby Fritts, Prescott and others, as promoters, were enriched rather than the client/investors.

The defendant argues that these paragraphs are surplus because they do not set forth any element of the crime, nor does the government quote any statute making these alleged acts a crime. Moreover, the defendant asserts that these paragraphs contain inflammatory and prejudicial language, "obviously designed simply to inflame the jury and prejudice them against the defendant." Defendant's Memo in Support of Motion, p. 2.

I disagree and rely on the Ninth Circuit's holding in United States v. Root, 366 F.2d 377 (9th Cir. 1966). There the court held that "[w]ords that are employed in an indictment that are descriptive of that which is legally essential to the charge in the indictment cannot be stricken out as surplusage." Id. at 381. I find no legal requirement that an indictment state only the bare elements of the offenses charged. Moreover, the allegations in the paragraph quoted above are inextricably intertwined with the elements of the offenses. Finally, I find that none of the terms objected to by defendant are inflammatory or unduly prejudicial in the context quoted above. Also, it is


significant that these are allegations by the government and not intended to be impartial.

CONCLUSION

Defendant's renewed motion to strike surplusage (doc. 107) is denied with leave to renew. Further, defendant's discovery motion (doc. 108) is granted as stipulated to on the record.

IT IS SO ORDERED.

Dated this 12 day of June 2008.



Ann Aiken
United States District Judge